No. 12322

In The United States Court of Appeals
For the Ninth Circuit

COMPANIA NAVIERA LIMITADA, a corporation, claimant of the Motor Tanker "URANIA," Her Engines, Tackle, Apparel, Furniture and Equipment.
Appellant,

vs.

E. A. BLACK and J. J. FEATHERSTONE, Copartners doing business under the name and style of Commercial Ship Repair,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

MERRITT, SUMMERS & BUCEY,
LANE SUMMERS,
CHARLES B. HOWARD,
Proctors for Appellant.

840 Central Building,
Seattle 4, Washington

FRAYN PRINTING COMPANY

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REPLY BRIEF OF APPELLANT

Appellant will reply to the points discussed in appellees' brief in the same order in which these points were set out therein.

I.

Work Performed by Appellees' Emloyees on the Oil Cooler, Telemotor and Clayton Heating Boiler Was Done Under Contract and Not Merely on the Basis of Loaned Servants.

Appellees contend that their contractual undertaking was limited to lending personnel to work under appellant's supervision and control (Appellees' Br. 2).

An examination of Item No. 1 of the contract for extra work (Lbts. Ex. No. 4, Aps. 254) will disclose that, although the appellees undertook in the first sentence to furnish diesel engine machinists to "work in the engine room as directed by the chief engineer" (Aps. 255), other and subsequent work specified and set out under that item of the contract was to be performed by appellees themselves as their own undertaking. Much of this work was done ashore in appellees' shops and yard, such as installation of new liners in five cylinders, grinding, testing and repacking of various valves, and shop work in cleaning and testing the heat exchangers and coolers (Aps. 575-578).

Further proof that such work was done under the supervision and control of appellees is found in the testimony of Mr. Harper, appellees' chief accountant. He testified that time of shipyard employees working under the supervision of appellees' foremen, was charged to this work (Aps. 409), and appellees justified the charges for extra work by showing an item of $10,978.00 overhead on a total of $28,145.82 cost of labor, stores and material for the extra work performed, and claimed that such

overhead charge was not unreasonable or excessive in amount (Lbts. Ex. 12, Aps. 413, 434). Again, as to the engine repairs under Item No. 1 of the extra work contract, appellees show a total labor cost of $1156.28 and charged as overhead on this labor cost the sum of $739.21 (Aps. 415). The overhead included supervision, other than foremen's salaries, which were actually included in the labor charges (Aps. 432). Do appellees intend this court to believe that they were only loaning employees and workmen to do all the work on the engines under Item No. 1 of the extra work contract and still appellees were charging almost 60% of the labor cost as overhead?

In *The St. Louis* (CCA 2) 296 Fed. 855, 1924 A.M.C. 444, the Second Circuit Court recognized, in a case where repairs on a ship were undertaken by a shipyard, similar to the present case, that the shipyard could not avoid liability merely because the ship's officers and crew participated in repair work being performed on the vessel. The court said:

> "The contract for reconditioning the St. Louis and other vessels belonging to libelants was one of bailment (Pan American v. Robins [C.C.A.] 281 Fed. 97), and respondents, the bailees, were to do the work with their own servants, at their own yard. That contempora-

neously libelants were to do, and were doing, other work is immaterial."

The St. Louis, 296 Fed. 855, 857, 1924 A.M.C. 444.

Appellees maintain in their brief that the particular work performed by them on the lubricating oil cooler was examined by an assistant engineer of the "Urania" and by Mr. Gallagher, a surveyor, and that since neither of these persons objected to the manner in which the work on the coolers had been performed, no complaint by appellant can be considered at this time (Appellees' Br. 6). It should be remembered, however, that the work on the coolers was performed in appellees' shore shops, and the record indicates that neither the ship's engineer nor Mr. Gallagher was present in the shops during the cleaning and repair of the coolers. In fact, Mr. Gallagher, the surveyor, is shown only to have been present in the ship with the engineer for "I suppose five minutes or so, maybe 10 minutes" (Aps. 1447) *after* the first cooler had been tested by appellees' pipe shop foreman (Aps. 1449). In addition to the above, we have the following testimony given by the chief engineer of the "Urania":

"Q. Did you or anybody concerned with the ship do any work on this cooler?

A. No, nothing" (Aps. 716.)

"Q. I understand. My question is did you clean the water pipes leading into the cooler?

A. No. The unit and the cooler itself was taken care of by the shop." (Aps. 739.)

Appellees' pipe shop foreman testified in detail as to what work he and the shipyard employees performed on the coolers (Aps. 1438). He testified that the chief engineer of the "Urania" did not specify the type of cleaning fluid or solution that was used in cleaning the heat exchangers or coolers (Aps. 1454). Nowhere in the record does it appear that crew members or representatives of appellant participated in the work on the coolers, or were even present during such work, except for the few minutes that Mr. Gallagher and the assistant engineer are reported to have been present after at least part of the testing of the coolers had been completed.

Even if appellant's representatives had been present and had participated to some extent in such work, we submit that appellees cannot be relieved from their failure to properly perform their obligations as undertaken in the extra work contract. Thus, it has been held by the same court in which this case was tried that inspection of repair work on a ship by a chief engineer does not waive defects and negligent performance by a shipyard. In *The West Katan* (W. D. Wash.) 1929

A.M.C. 1559, the question was presented as to inspection of a defective piston head supplied by a shipyard for the main engine of a vessel. The court said:

> "Holes were drilled in the lower surface of the casting for the removal of the core or cores after the casting. The then Chief Engineer upon the respondent vessel, evidently before the holes were thereafter plugged, and while the piston was at the plant where it was being machined for libellant, upon his inspection, noticed the thinness of the lower side of the piston. The nature of the Chief Engineer's employment was not such, however, as to authorize him to waive for claimant such defect. Neither was the inspection of the piston head in its making by other agents of the owner of such a nature as to relieve libellant from its implied warranty."
>
> *The West Katan,* 1929 A.M.C. 1559, 1565.

The Second Circuit Court of Appeals has held to the same effect in *West Nohno* (CCA 2) 21 F. 2nd 304, 1927 A.M.C. 1581, 1584. The decision of the Second Circuit Court of Appeals in *The St. Louis, supra,* as previously quoted herein, also supports this rule, as does the decision of this court in *The Ecuador* (CCA 9) 1926 A.M.C. 342, 10 F. 2nd 769, and of the Second Circuit Court of Appeals in *Pan-American Petroleum T. Co. v. Robins Dry D. & R. Co.* (CCA 2) 281 F. 97, cert. den. 259 U. S. 586,

66 L. Ed. 1076, as discussed in appellant's opening brief.

The doctrine of loaned servant, which appellees seek to apply in this case, is not applicable for the reason that appellees assume that their servants were loaned to appellant, whereas in fact appellees had control and supervision over the particular work out of which the claims in the cross libel arise.

Appellees cite *Atlantic Transport v. Coneys* (CCA 2) 82 Fed. 177 in support of thier position. The following statement from the opinion of the Circuit Court in that case will demonstrate the fallacy of attempting to apply the loaned servant doctrine to the present case.

> "* * * it is true that the officers of defendant corporation (the shipowner) had some general power to direct how alterations and repairs should be made, but they had no particular power 'to direct and control the manner of performing the very work in which the carelessness occurred,' and [that] the existence or nonexistence of such kind of power is the real question in the case."
>
> *Atlantic Transport v. Coneys* (CCA 2) 82 Fed. 177, 180.

The general rule on this doctrine of loaned servant is stated in American Jurisprudence, as follows:

> "If he (the master) does not surrender full full control over the servant, he remains liable

for his negligence during the time he acts for the person to whom he is loaned."

35 *Am. Juris., Master & Servant,* §541, p. 971.

In summary of this point, it seems clear from the record that although the chief engineer of the "Urania" may have supervised the work of appellees' machinists performed in the engine room of the vessel (Aps. 361), he did not supervise other work performed, such as cleaning and testing of the oil cooler and testing and repair of the Clayton heating boiler, which work appellees undertook to perform in their shore shops with their own employees and using their own supervisory personnel. For the negligent performance of such work appellees should be held liable to appellant in this case. Obviously, at some point the desired repair work on a vessel must be specified and requested by the representatives of the shipowner. Surely this in itself should not constitute action which would relieve appellees of their contractual obligation to properly perform the work.

II.

Appellant Proved by a Preponderance of the Evidence a Breach of Duty by Appellees and Their Employees in Performing the Work on the Oil Cooler of the Main Engine.

Appellees next contend that the test, including the 50-pound pressure applied to the cooler, was

adequate, relying on the opinions of several of their witnesses to substantiate the contention (Appellees' Br. 13). Yet the *fact* remains uncontradicted on the record that the operating manual of the engine manufacturer specified a test pressure of four times the amount used by appellees on the cooler (Respondent's Ex. A-16, Appellant's Br. 23). Appellees seek to dismiss this very important fact by merely stating that "it is abundantly clear from the testimony that none of this data is applicable in determining whether a proper test was used by Mr. Oakland" (Appellees' Br. 12).

We submit that the opinions of appellees' witnesses cannot and should not be substituted for the fact of the specific instructions of the engine manufacturer as to a proper test pressure on the cooler, nor can it be persuasively argued that such data in the operating manual was only placed therein to show extreme maximum pressures. The purpose of the manual was to serve as a guide in the operation, maintenance and repair of the engine and accessories. Certainly the manufacturer intended the data to be used as a guide in determining the extent of pressure to be applied in testing the unit for leakage, rather than merely to report the "breaking point" maximum pressures that had been applied to the unit during the course of manufacture.

III.

The Negligence of Appellees Was Proved by a Preponderance of the Evidence to be the Proximate Cause of the Breakdowns of the Vessel.

Appellees' brief, in discussing this point, entirely disregards the affirmative testimony of several witnesses who examined the "Urania" after breakdowns and arrival at Los Angeles and who uniformly stated the cause of the breakdowns to be galling of the helical timing gears due to poor lubrication attributable to leaks *actually found* in the oil cooler. Testimony of these witnesses has already been identified, with reference to the Apostles, in Appellant's Opening Brief (pp. 12-15) and will not be repeated herein.

Likewise, the testimony of the same qualified witnesses eliminated any other possible causes of the breakdowns, and the testimony of these expert witnesses is identified with Apostle references in Appellant's Opening Brief (pp. 15-17).

Appellees in their brief seek by reference to isolated questions and answers of these same witnesses to convince this court that such threads of testimony preponderate over the accumulation of other testimony to the contrary (Appellees' Br. 19-21). Certainly, an examination of the testimony of witnesses Dupuy, Pike, Summers, S. W. Newell, M. L. Newell and N. A. Cross, in its entirety will

convince this court that the witnesses did in fact eliminate other possible causes, including those causes advanced by appellees.

IV.

Clayton Heating Boiler

Appellees maintain in their brief that appellant's proof of malperformance and damage as to this unit is dependent upon "gossip" and "self-serving" statements (Appellees' Br. 35).

The gossip referred to by appellees is the sworn testimony of the service representative of the manufacturer of the heating boiler who personally went aboard the vessel at Los Angeles after breakdowns and removed the unit to the manufacturer's repair shop ashore for repairs, and later reinstalled the unit aboard the vessel, making necessary adjustments thereon (Aps. 823-825). Who could possibly be in a better position to state the nature of damage to the pumps on the boiler?

To be sure, the witness candidly stated that he did not make all the repairs himself, the work having been performed in the ordinary course of the manufacturer's business, and the findings of the persons actually performing the repairs having been incorporated into a routine report prepared by the witness (Aps. 828). We submit that the testimony and Respondent's Exhibit A-15 are com-

petent to show the nature, extent and cause of the damage.

In addition, the chief engineer described how he found broken parts or pieces in the pump of the boiler when it was dismantled after breakdown (Aps. 744). Appellees concede in their brief that the pump on the boiler was not functioning properly on "the very day that the 'Urania' sailed from appellees' yard," resulting in efforts being made on October 15 to further repair the unit (Appellees' Br. 37). Surveyor Clarke, who at the time of testifying in this case was employed by appellees' California affiliate, Commercial Ship Repair, Inc., (Aps. 769) admitted that the pump of the boiler was not disassembled for inspection when these further repairs were attempted on the date of departure from the appellees' yard (Aps. 758). He was only able to testify that no leaks were observed after replacement of certain packing in the pump and removal of emulsified oil.

V.

Telemotor Steering System

Appellees seek in their brief to absolve themselves of any liability for breakdown of the steering system by claiming that their contract obligation was limited to testing out and lubrication of parts (Appellees' Br. 38).

The record shows, however, that appellees' workmen actually hooked up the wiring in the steering system which was found to be partially disconnected (Aps. 1547). Certainly, such work was not gratuitously performed by appellees, and whether it is of a type coming within the classification of "testing out" as used in the contract, or the description of "repair" as used in Appellant's Brief, the record shows that it was performed by appellees without suggestion of any supervision or attempted control by appellant, and hence appellees should be liable for damages resulting from breakdown proved to have been due to improper connecting up or adjustment of the unit (Aps. 766, 1538). In fact, appellees' electrical foremen undertook to instruct the chief engineer of the "Urania" as to proper operation of the telemotor steering system, which would tend to negative any claim that work performed on this unit was under the control or supervision of appellant's employees (Aps. 1548).

CONCLUSION

The court below was of the opinion that appellant had failed to prove by a preponderance of the evidence that the various breakdowns and failures on the vessel were caused by malperformance or nonperformance of appellees' obligations. It is re-

spectfully submitted that these conclusions of the trial court are contrary to the evidence as discussed in appellant's brief.

We therefore submit that the decree of the court below should be reversed.

Respectfully submitted,

MERRITT, SUMMERS & BUCEY,

LANE SUMMERS,

CHARLES B. HOWARD,

Proctors for Appellant.